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Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6999

DATE COMPLAINT FILED: January 11, 2016

DATE OF NOTIFICATION: January 15, 2016

LAST RESPONSE RECEIVED: January 26, 2016

DATE ACTIVATED: March 3, 2016

ELECTION CYCLE: 2016

EXPIRATION OF SOL:

Earliest - August 4, 2020

Latest - December 11, 2020

COMPLAINANT:

Brian M. Nelson, Esq.

RESPONDENTS:

David Larsen

Exploratory Congressional Committee for David

Larsen DBA: David Larsen for Congress and

David Larsen in his official capacity as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30102(e)

52 U.S.C. § 30103(a)

52 U.S.C. § 30104(a), (b)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.1(a)

11 C.F.R. § 104.5(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that House candidate David Larsen violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by filing a late Statement of Candidacy with the Commission. According to the Complaint, Larsen made public statements throughout 2015 and engaged in other campaign-related activities that triggered candidate status months before he

1 filed his Statement of Candidacy on December 29, 2015. Larsen argues he was merely "testing
2 the waters" before his official candidacy announcement.

3 As discussed below, the available information indicates that Larsen had become a
4 candidate by July 20, 2015, and he therefore should have filed his Statement of Candidacy by
5 August 4, 2015. Consequently, Larsen's federal committee filed its Statement of Organization
6 late and failed to file a 2015 October Quarterly Report.

7 Accordingly, we recommend that the Commission find reason to believe that David
8 Larsen violated 52 U.S.C. § 30102(e), and that the Exploratory Congressional Committee for
9 David Larsen DBA: David Larsen for Congress and David Larsen in his official capacity as
10 treasurer violated 52 U.S.C. §§ 30103(a) and 30104(a), authorize pre-probable cause
11 conciliation, and approve the attached conciliation agreement.

12 II. FACTUAL AND LEGAL ANALYSIS

13 A. Factual Background

14 David Larsen ran for New Jersey's 7th Congressional District in the 2010, 2012, and
15 2014 election cycles.¹ He filed a Statement of Candidacy on December 29, 2015, to run for the
16 same office in the 2016 cycle and designated the "Exploratory Congressional Committee for
17 David Larsen DBA: David Larsen for Congress" ("Committee") as his authorized campaign

¹ Larsen lost the primary election in each of those election cycles. *See*
<http://www.fec.gov/pubrec/fe2010/2010house.pdf>; <http://www.fec.gov/pubrec/fe2012/2012congresults.pdf>;
<http://www.fec.gov/pubrec/fe2014/2014house.pdf>; <http://www.nj.gov/state/elections/2016-results/2016-unofficial-...>

1 committee.² Larsen's campaign committees for the 2010, 2012, and 2014 election cycles had the
2 same name.³

3 On January 31, 2016, the Committee filed its 2015 Year-End Report, covering activity
4 from February 2, 2015, through the end of the calendar year. The report indicates that during the
5 period Larsen states he was merely exploring a run, the campaign received \$12,225.69 in
6 contributions and \$213,513 in candidate loans, and it disbursed \$24,212.88.⁴ The campaign
7 spent \$5,000 by July 20, 2015, and it raised \$5,000 in itemized contributions by October 2,
8 2015.⁵

9 The Complaint alleges that Larsen became a candidate earlier than December 2015, as
10 shown by his public statements and fundraising events, and because a political consultant was

² See http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424650+0 and http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424651+0. Larsen lost that primary election to incumbent Leonard Lance on June 7, 2016. https://ballotpedia.org/New_Jersey%27s_7th_Congressional_District_election,_2016.

³ See Statements of Organization (Jan. 8, 2010, Jan. 8, 2012, and Jan. 27, 2013), available at http://docquery.fec.gov/cgi-bin/fecimg?_10030212794+0, <http://docquery.fec.gov/cgi-bin/fecimg/>, and http://docquery.fec.gov/cgi-bin/fecimg?_13031142217+0.

⁴ See http://docquery.fec.gov/cgi-bin/fecimg?_201602019005299975+0.

⁵ *Id.* According to the Committee's 2015 Year-End report, its earliest reported contribution was dated June 10, 2015, and its earliest reported disbursement was made on February 2, 2015. *Id.*

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working for the campaign months before Larsen announced his candidacy.⁶ For example,

- June and August 2015 fundraising invitations used a logo with express advocacy (see below)⁷ and they display the address to Larsen's official campaign website, DavidLarsenforCongress.com, at various places on the invitations;⁸



- Similarly, the name of Larsen's website, Facebook page, and Twitter account (DavidLarsenforCongress.com, "David Larsen for Congress-@DavidLarsenforCongress," and "@Larsen4Congress") advocated his election;⁹
- Larsen made public statements that seemed to refer to himself as a candidate, and advocated his election or the defeat of his primary opponent.

As to the last point, the Complaint states that Larsen was quoted at a February 2015

Republican event stating, "I think we'll probably do it again," "[w]e'll win this time," and "[i]t's

⁶ The Complaint also claims that the Committee's sponsorship costs (\$550) incurred for a March 31, 2015, Reagan Day event and funds raised from fundraiser ticket prices (\$150 per person) demonstrate that Larsen had become a candidate earlier than December 2015. Compl. at 2, 8, and Exs. B, D and F. Finally, the Complaint questions the Committee's use of a professional campaign consultant, King Penna, during the time that Larsen asserts he was testing the waters. Compl. at 2. Larsen responds that Penna was a personal friend and that he has never been a paid consultant for his campaigns. Resp. at 3.

⁷ Compl. at 2, and Exs. D and F. The Committee posted links to these invitations on its Facebook and Twitter pages. See also Compl. at 2. During the 2016 election cycle, the same banner appeared frequently in Committee Facebook posts and tweets, as early as April 2015, and appears to be the same letterhead logo that Larsen used in his prior campaigns. See e.g., <https://www.facebook.com/DavidLarsenforCongress/posts/671443122961130> (Apr. 3, 2015); @Larsen4Congress (June 23, 2015) (displaying banner with link to a media release).

⁸ The invitations solicit contributions to benefit Larsen's "2016 Exp. Congressional Campaign" and state that they are "Paid for by David Larsen for Congress Exp. Committee."

⁹ The Committee's Facebook page indicates it was created during an earlier election cycle, on January 1, 2013, and its Twitter account page, known as @Larsen4Congress, states that the Committee joined Twitter in February 2014. See https://www.facebook.com/DavidLarsenforCongress/info/?tab=page_info; <https://twitter.com/larsen4congress>.

1 time to do it again.”¹⁰ On February 3, 2015, the Committee tweeted a link to the same press
2 report.¹¹ On October 13, 2015, the Committee used its Twitter account, @Larsen4Congress, to
3 post a link to a press release specifically encouraging the defeat of incumbent Leonard Lance and
4 advocating Larsen’s election.¹² The release states, among other things, that residents of the 7th
5 Congressional District “... can join the Gun Owners of America . . . and support David Larsen for
6 Congress.”¹³ The release displays the same campaign logo shown above, includes a disclaimer
7 stating that it was paid for by the “David Larsen for Congress Exp. Committee,” and lists the
8 campaign’s website “DavidLarsenForCongress.com” underneath.¹⁴ Additional text below the
9 disclaimer lists “DavidLarsenForCongress.com” again.

10 Eighteen days before Larsen registered as a candidate, the Complainant received a
11 fundraising solicitation from the Committee by mail stating “My name is David Larsen. I’m
12 running for Congress.”¹⁵ The mailer included a three-page letter signed by Larsen, a reply insert,
13 and a reply envelope.¹⁶ In the letter, Larsen states, among other things, “[t]his is one of the
14 reasons why I am ... moving forward with my campaign for NJ 7th Congressional District.”¹⁷ The

¹⁰ Compl. at 1 and Ex. A.

¹¹ See <https://twitter.com/larsen4congress>. That appears to have been the Committee’s first tweet during the 2016 election cycle. Earlier tweets on the Committee’s Twitter page date back to June 2014.

¹² Compl. at 2 and Ex. G; see also <http://myemail.constantcontact.com/For-Immediate-Release---The-Boehner-Connection---The-Republican-Defection.html?soid=1103157500199&aid=JIchceYU3ao>. The release also appears on the Committee’s website. See <http://davidlarsenforcongress.com/pr/2015/10/09/boehner-connection-republican-defection.html>.

¹³ Compl. at Ex. G.

¹⁴ *Id.* The release also lists the same campaign contact (King Penna).

¹⁵ *Id.* at Ex. H.

¹⁶ *Id.* at 4, and Exs. H, J, K, and L.

¹⁷ *Id.* at H.

1 letter also asks "return the enclosed envelope with your most generous investment into our
2 campaign for your future."¹⁸ The letter uses the same campaign logo, lists a website,
3 www.WhoisDavidLarsen.com, and includes a disclaimer: "Paid for by David Larsen for
4 Congress," along with an address and phone number. The reply insert, states that it was "Paid
5 for by David Larsen for Congress *Exp. Committee*" [emphasis added] but asks that checks be
6 made payable and mailed to "David Larsen for Congress."¹⁹

7 Larsen responds that he did not become a candidate until he "officially registered" with
8 the Commission in December 2015.²⁰ Larsen notes that he "did not deploy signs, open a
9 campaign office, seek signature petitions, advertise on radio, tv or newspapers," and did not
10 actively campaign as a candidate until . . . Dec. [2015]," and primarily used his personal funds
11 during the exploratory period.²¹ Larsen further explains that the February 2015 statement was his
12 response to a reporter's question asking if he would run again. Larsen contends that he meant
13 that he might run again, not that he had already decided to run.²² He argues that his fundraisers
14 were all under the "Exploratory label" and were aimed at determining the amount of support he
15 could receive.²³ Likewise, he discounts the October 2015 tweet, explaining that the press release
16 did not actually state that he was a candidate, but rather contained "a generic statement [] that

¹⁸ *Id.*

¹⁹ *Id.* at Ex. J and K. Apparently, a nail file included with the mailing also contained the printed statement "David Larsen for Congress." *Id.* at Ex. L.

²⁰ Resp. at 1. Larsen apparently believed, however, that he needed to register as a candidate with the FEC within 30 days of his decision to become a candidate. *Id.* at 4. Thus, he appears to acknowledge that the December 11 fundraising letter was sent after he made the decision to become a candidate. *Id.*

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.* He states that the sponsorship at the Reagan Day Dinner was also aimed at gauging interest and support for his campaign.

1 hopefully [Lance and McCarthy] will be unseated.”²⁴ Larsen also notes that the disclaimer
2 identifies his exploratory committee as opposed to his authorized campaign committee but
3 acknowledges that “the last sentence [of the October press release] could have been worded
4 differently.”²⁵

5 **B. Larsen Filed a Late Statement of Candidacy**

6 An individual is deemed to be a “candidate” for purposes of the Act if he or she receives
7 contributions or makes expenditures in excess of \$5,000.²⁶ Once an individual meets the \$5,000
8 threshold, he or she has fifteen days to designate a principal campaign committee by filing a
9 Statement of Candidacy.²⁷ The principal campaign committee must then file a Statement of
10 Organization within ten days of its designation, *see* 52 U.S.C. § 30103(a), and must file
11 disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b). Any
12 change or correction in the information on a Statement of Organization must be reported to the
13 Commission within ten days of the change or correction.²⁸ Treasurers of House candidates are
14 required to file quarterly reports in non-election and election years no later than the fifteenth day
15 following the close of the immediately preceding calendar quarter.²⁹

²⁴ *Id.* at 4.

²⁵ *Id.* at 3-4.

²⁶ 52 U.S.C. § 30101(2).

²⁷ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

²⁸ 52 U.S.C. § 30103(c); 11 C.F.R. § 102.2(a)(2). When Larsen filed his Statement of Candidacy, he designated a principal campaign committee containing the word “exploratory” in its name, which seems to be inaccurate and potentially misleading. The Commission’s Campaign Guide instructs committees that they may change their names from “exploratory” once the candidate’s campaign ends its exploratory phase. *See Campaign Guide for Congressional Candidates and Committees* at 3 (June 2014). However, the Committee has used the same name in three earlier election cycles, and the Reports Analysis Division Review and Referral Procedures do not contain a provision to send a letter for removing the word “exploratory” from the committee’s name after the individual meets the statutory definition of a candidate.

²⁹ 11 C.F.R. § 104.5(a).

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1 The Commission has established limited exemptions from these thresholds, which permit
2 an individual to test the feasibility of a campaign for federal office without becoming a candidate
3 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.
4 §§ 100.72 and 100.131 exclude from the definitions of "contribution" and "expenditure,"
5 respectively, those funds received, and payments made, to determine whether an individual
6 should become a candidate.³⁰ "Testing the waters" activities include, but are not limited to,
7 payments for polling, telephone calls, and travel.³¹ An individual who is "testing the waters"
8 need not register or file disclosure reports with the Commission unless and until the individual
9 subsequently decides to run for federal office or conducts activities that indicate he or she has
10 decided to become a candidate.³²

11 Certain activities may indicate that the individual has decided to become a candidate and
12 is no longer "testing the waters." Commission regulations set out five non-exhaustive factors to
13 be considered in determining whether an individual has decided to become a candidate. An
14 individual indicates that he or she has gone beyond "testing the waters" and has decided to
15 become a candidate, for example, by making or authorizing written or oral statements that refer

³⁰ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . ."). *See* 52 U.S.C. § 30101(8), (9).

³¹ 11 C.F.R. §§ 100.72(a), 100.131(a).

³² *See id.*; *see also* Advisory Op. 1979-26 (Grassley).

1 to him or her as a candidate for a particular office.³³ These regulations seek to draw a distinction
2 between activities directed to an evaluation of the feasibility of one's candidacy, and conduct
3 signifying that a private decision to become a candidate has been made.³⁴

4 Once an individual begins to campaign or decides to become a candidate, funds that were
5 raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a candidate and
6 the candidate must register with the Commission.³⁵ Once an individual reaches candidate status,
7 all reportable amounts from the beginning of the testing-the-waters period must be disclosed on
8 the first financial disclosure report filed by the candidate's committee, even if the funds were
9 received or expended prior to the current reporting period.³⁶

10 There is evidence indicating that Larsen had decided to run for Congress months before
11 his actual registration, and he became a "candidate" under the Act on July 20, 2015, when his
12 expenditures exceeded \$5,000. Most notably, the fundraising invitations the Committee sent in
13 June and August 2015 appear to publicize Larsen's intention to run. Both invitations advertise
14 an event "hosted by Larsen for Congress." They prominently display the "Larsen for Congress"
15 logo at the top of both invitations—the same logo the candidate used in a prior campaign. The
16 repeated references to "Larsen for Congress" and his congressional campaign, the use of "Larsen

³³ *Id.* §§ 100.72(b), 100.131(b). The other examples set forth in these regulations indicating a person has decided to run for office include: (1) using general public political advertising to publicize his or her intention to campaign for federal office, (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) conducting activities in close proximity to the election or over a protracted period of time; or (4) taking action to qualify for the ballot under state law.

³⁴ See Advisory Op. 1981-32 (Askew) ("AO 1981-32") (explaining that the testing the waters exemptions become inapplicable once the public activities of the individual take on a partisan political quality).

³⁵ 11 C.F.R. §§ 100.72(a), 100.131(a); see Factual and Legal Analysis ("F&LA") at 3, MUR 6533 (Perry Haney); F&LA at 5, MUR 6449 (Jon Bruning).

³⁶ 11 C.F.R. §§ 101.3, 104.3(a), 104.3(b).

1 for Congress" logo letterhead, the display of the "DavidLarsenForCongress" website address,
2 and the dissemination of these invitations via the "David Larsen for Congress" Facebook page
3 and @Larsen4Congress Twitter account adequately demonstrate that by June 2015, Larsen had
4 decided to run for Congress.³⁷

5 Larsen argues that the invitations did not show that he had decided to run because they
6 were sent under the name of his exploratory committee. The Commission, however, has
7 recognized that the mere use of the term "exploratory" in campaign communications is not the
8 determining factor in whether the candidate was still testing the waters.³⁸ Instead, the
9 Commission examines the rest of the communication along with the individual's activities.³⁹
10 Moreover, Larsen's references to his purported exploratory status were not clear; the invitations
11 requested "your presence at a Fundraising Event for his 2016 *Exp.* Congressional Campaign" and
12 the disclaimer at the bottom of the invitations states that it was "Paid for by David Larsen for
13 Congress *Exp.* Committee." [Emphasis Added] The invitations do not explain that "Exp." stood

³⁷ AO 1981-32 at 4 (noting that activities that represent the establishment of a campaign organization fall outside the testing the waters exemption, and recommending that the individual avoid expressions such as "Askew for President" or similar statements in "titles or headings used to identify an office . . . and on letterhead stationery"); *see, e.g.*, Statement of Reasons, Comm'r's Peterson, Hunter, McGahn & Weintraub at 2, MUR 5930 (Schuring) (distinguishing case from MUR 2615 (Harriett Wieder) in which Wieder sent solicitations using printed letterhead that referred to her as a candidate). *Cf.* MUR 6776 (Innis for Congress) (dismissing matter where, among other factors, solicitations stated the individual sought financial support while he *explored* a possible run for Congress).

³⁸ *See* F&LA at 9, MUR 6449 (Bruning) (finding that even though it was sent under the exploratory committee letterhead, the text of a solicitation itself was an indication that candidate had decided to run); Second Gen. Counsel's Rpt. at 4-6, MUR 5693 (Aronsohn) (rejecting argument that the communications at issue were covered under the testing the waters exemption merely because of their repeated use of the word "exploratory," and finding probable cause based on other language and conduct indicating the decision to become a candidate had been made); F&LA at 7-8 MUR 5363 (Sharpton) (concluding individual became a candidate 6 months before he filed his Statement of Candidacy based on clear statements made in his book that he was running for President and finding that the formation of an "exploratory" committee did not negate those statements or "eradicate the registration and reporting requirements that [had] been triggered").

³⁹ *See, e.g.*, Second Gen. Counsel's Rpt. at 9-10, MUR 5693 (Aronsohn) (examining candidate's statements along with indications that he was raising funds for the election and "not simply assessing the potential strength of his financial base").

1 for "exploratory," nor the legal significance of that word.⁴⁰ Indeed, the Committee continued to
2 use the "Exp." abbreviation in its December fundraising letter, which Larsen acknowledges was
3 sent after he had decided to become a candidate.

4 But there is also information that Larsen may have decided to run for office four months
5 earlier than the June 2015 invitation. A February 2015 press report quotes Larsen as saying "it's
6 time to do it again," and "we'll win this time," and Larsen linked to this report on his Twitter
7 feed without correction. Larsen now claims that these statements did not mean that he had
8 decided to run, merely that he was thinking about running, and he was also quoted in the article
9 as saying as "I think we'll probably do it again," which offers some support for his
10 position. However, taken as a whole, including the fact that he shared a link to this report from
11 his Twitter account, the more reasonable explanation of Larsen's statements is that he had
12 already decided to run for Congress for a fourth time.

13 But even without the February 2015 statements, we conclude that the June 2015
14 invitation showed that Larsen had decided to run for Congress, and the Committee spent more
15 than \$5,000 by July 20, 2015. Thus, Larsen should have filed his Statement of Candidacy by
16 August 4, 2015, and the Committee should have filed a Statement of Organization within the
17 next ten days. However, Larsen filed his Statement of Candidacy 147 days late, in violation of
18 52 U.S.C. § 30102(e), and the Committee filed a late Statement of Organization, in violation of

⁴⁰ Larsen sometimes used a more complete version of the Exploratory Committee's full name on its communications during the first half of 2015. For example, on a Reagan Dinner sponsorship in March, it listed the Committee's name as "David Larsen for Congress Exploratory Committee." But he seemed to use both names (with and without the exploratory label) interchangeably in the Committee's communications throughout the summer and fall. In the context of Advisory Opinions, the Commission has reiterated the need for political committees to fully identify themselves in their public communications in order to give the reader "adequate notice of the identity of the person or political committee that paid for the communication and where required, that authorized the communication." See, e.g., Advisory Opinion 2013-13 (Freshman Hold'em JFC) at 2-3; 11 C.F.R. § 110.11(c)(1). In this case, however, we do not have sufficient facts to determine if disclaimers were required for any of these communications.

1 52 U.S.C. § 30103(a). In addition, the Committee's first disclosure report should have been the
2 2015 October Quarterly Report, covering the testing the waters period through September 30,
3 2015, and it violated 52 U.S.C. § 30104(a) by failing to file it. Therefore, we recommend that
4 the Commission find reason to believe that Larsen violated 52 U.S.C. § 30102(e) and that the
5 Committee violated 52 U.S.C. §§ 30103(a) and 30104(a).⁴¹

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⁴¹ See, e.g., MUR 6449 (Bruning) (finding reason to believe that respondents did not timely file statements of candidacy and organization and authorizing pre-probable cause conciliation), MUR 5693 (Aronsohn) (same), MUR 5363 (Sharpton) (same). Cf. MUR 6785 (Kwasman for Congress) (dismissing as a matter of prosecutorial discretion because the statement of candidacy was filed only a few days late and did not cause the committee to miss filing a scheduled disclosure report); MUR 6533 (Perry Haney) (dismissing as a matter of prosecutorial discretion because regardless of the dates of statements that may have triggered candidacy, the committee still timely filed its initial disclosure report).


IV. RECOMMENDATIONS


1. Find reason to believe that David Larsen violated 52 U.S.C. § 30102(e).
2. Find reason to believe that the Exploratory Congressional Committee for David Larsen DBA: David Larsen for Congress and David Larsen in his official capacity as treasurer violated 52 U.S.C. §§ 30103(a) and 30104(a).
3. Approve the attached Factual and Legal Analysis.
4. Enter into conciliation with David Larsen and the Exploratory Congressional Committee for David Larsen DBA: David Larsen for Congress and David Larsen in his official capacity as treasurer prior to a finding of probable cause to believe.
5. Approve the attached Conciliation Agreement.

6. Approve the appropriate letters.

7.1.16
Date


Stephen Gura
Deputy Associate General Counsel for Enforcement


Peter G. Blumberg
Assistant General Counsel


Ana J. Peña-Wallace
Attorney

Attachments:
1-Factual and Legal Analysis

1-00044400M-1001

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** David Larsen **MUR 6999**
5 Exploratory Congressional Committee
6 for David Larsen DBA: David Larsen for Congress
7 and David Larsen in his official capacity as Treasurer
8

9 **I. INTRODUCTION**

10 This matter was generated by a Complaint filed with the Federal Election Commission
11 (the "Commission"). See 52 U.S.C. § 30109(a)(1). The Complaint alleges that House candidate
12 David Larsen violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by
13 filing a late Statement of Candidacy with the Commission. According to the Complaint, Larsen
14 made public statements throughout 2015 and engaged in other campaign-related activities that
15 triggered candidate status months before he filed his Statement of Candidacy on December 29,
16 2015. Larsen argues he was merely "testing the waters" before his official candidacy
17 announcement.

18 As discussed below, the available information indicates that Larsen had become a
19 candidate by July 20, 2015, and he therefore should have filed his Statement of Candidacy by
20 August 4, 2015. Consequently, Larsen's federal committee filed its Statement of Organization
21 late and failed to file a 2015 October Quarterly Report.

22 Accordingly, the Commission finds reason to believe that David Larsen violated
23 52 U.S.C. § 30102(e), and that the Exploratory Congressional Committee for David Larsen
24 DBA: David Larsen for Congress and David Larsen in his official capacity as treasurer violated
25 52 U.S.C. §§ 30103(a) and 30104(a).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

David Larsen ran for New Jersey's 7th Congressional District in the 2010, 2012, and 2014 election cycles.¹ He filed a Statement of Candidacy on December 29, 2015, to run for the same office in the 2016 cycle and designated the "Exploratory Congressional Committee for David Larsen DBA: David Larsen for Congress" ("Committee") as his authorized campaign committee.² Larsen's campaign committees for the 2010, 2012, and 2014 election cycles had the same name.³

On January 31, 2016, the Committee filed its 2015 Year-End Report, covering activity from February 2, 2015, through the end of the calendar year. The report indicates that during the period Larsen states he was merely exploring a run, the campaign received \$12,225.69 in contributions and \$213,513 in candidate loans, and it disbursed \$24,212.88.⁴ The campaign spent \$5,000 by July 20, 2015, and it raised \$5,000 in itemized contributions by October 2, 2015.⁵

¹ Larsen lost the primary election in each of those election cycles. *See* <http://www.fec.gov/pubrec/fe2010/2010house.pdf>; <http://www.fec.gov/pubrec/fe2012/2012congresults.pdf>; <http://www.fec.gov/pubrec/fe2014/2014house.pdf>; <http://www.nj.gov/state/elections/2016-results/2016-unofficial->

² *See* http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424650+0 and http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424651+0. Larsen lost that primary election to incumbent Leonard Lance on June 7, 2016. https://ballotpedia.org/New_Jersey%27s_7th_Congressional_District_election,_2016.

³ *See* Statements of Organization (Jan. 8, 2010, Jan. 8, 2012, and Jan. 27, 2013), *available at* http://docquery.fec.gov/cgi-bin/fecimg?_10030212794+0, <http://docquery.fec.gov/cgi-bin/fecimg/>, and http://docquery.fec.gov/cgi-bin/fecimg?_13031142217+0.

⁴ *See* http://docquery.fec.gov/cgi-bin/fecimg?_201602019005299975+0.

⁵ *Id.* According to the Committee's 2015 Year-End report, its earliest reported contribution was dated June 10, 2015, and its earliest reported disbursement was made on February 2, 2015. *Id.*

1 The Complaint alleges that Larsen became a candidate earlier than December 2015, as
2 shown by his public statements and fundraising events, and because a political consultant was
3 working for the campaign months before Larsen announced his candidacy.⁶ For example,

- 4 • June and August 2015 fundraising invitations used a logo with express advocacy
5 (see below)⁷ and they display the address to Larsen's official campaign website,
6 DavidLarsenforCongress.com, at various places on the invitations;⁸



- 7
8 • Similarly, the name of Larsen's website, Facebook page, and Twitter account
9 (DavidLarsenforCongress.com, "David Larsen for Congress-
10 @DavidLarsenforCongress," and "@Larsen4Congress") advocated his election;⁹
11
12 • Larsen made public statements that seemed to refer to himself as a candidate, and
13 advocated his election or the defeat of his primary opponent.
14

⁶ The Complaint also claims that the Committee's sponsorship costs (\$550) incurred for a March 31, 2015, Reagan Day event and funds raised from fundraiser ticket prices (\$150 per person) demonstrate that Larsen had become a candidate earlier than December 2015. Compl. at 2, 8, and Exs. B, D, and F. Finally, the Complaint questions the Committee's use of a professional campaign consultant, King Penna, during the time that Larsen asserts he was testing the waters. Compl. at 2. Larsen responds that Penna was a personal friend and that he has never been a paid consultant for his campaigns. Resp. at 3.

⁷ Compl. at 2, and Exs. D and F. The Committee posted links to these invitations on its Facebook and Twitter pages. See also Compl. at 2. During the 2016 election cycle, the same banner appeared frequently in Committee Facebook posts and tweets, as early as April 2015, and appears to be the same letterhead logo that Larsen used in his prior campaigns. See e.g., <https://www.facebook.com/DavidLarsenforCongress/posts/671443122961130> (Apr. 3, 2015); @Larsen4Congress (June 23, 2015) (displaying banner with link to a media release).

⁸ The invitations solicit contributions to benefit Larsen's "2016 Exp. Congressional Campaign" and state that they are "Paid for by David Larsen for Congress Exp. Committee."

⁹ The Committee's Facebook page indicates it was created during an earlier election cycle, on January 1, 2013, and its Twitter account page, known as @Larsen4Congress, states that the Committee joined Twitter in February 2014. See https://www.facebook.com/DavidLarsenforCongress/info/?tab=page_info; <https://twitter.com/larsen4congress>.

As to the last point, the Complaint states that Larsen was quoted at a February 2015 Republican event stating, "I think we'll probably do it again," "[w]e'll win this time," and "[i]t's time to do it again."¹⁰ On February 3, 2015, the Committee tweeted a link to the same press report.¹¹ On October 13, 2015, the Committee used its Twitter account, @Larsen4Congress, to post a link to a press release specifically encouraging the defeat of incumbent Leonard Lance and advocating Larsen's election.¹² The release states, among other things, that residents of the 7th Congressional District "... can join the Gun Owners of America ... and support David Larsen for Congress."¹³ The release displays the same campaign logo shown above, includes a disclaimer stating that it was paid for by the "David Larsen for Congress Exp. Committee," and lists the campaign's website "DavidLarsenForCongress.com" underneath.¹⁴ Additional text below the disclaimer lists "DavidLarsenForCongress.com" again.

Eighteen days before Larsen registered as a candidate, the Complainant received a fundraising solicitation from the Committee by mail stating, "My name is David Larsen. I'm running for Congress."¹⁵ The mailer included a three-page letter signed by Larsen, a reply insert, and a reply envelope.¹⁶ In the letter, Larsen states, among other things, "[t]his is one of the

¹⁰ Compl. at 1 and Ex. A.

¹¹ See <https://twitter.com/larsen4congress>. That appears to have been the Committee's first tweet during the 2016 election cycle. Earlier tweets on the Committee's Twitter page date back to June 2014.

¹² Compl. at 2 and Ex. G; see also <http://myemail.constantcontact.com/For-Immediate-Release---The-Boehner-Connection---The-Republican-Defection.html?soid=1103157500199&aid=JIchceYU3ao>. The release also appears on the Committee's website. See <http://davidlarsenforcongress.com/pr/2015/10/09/boehner-connection-republican-defection.html>.

¹³ Compl. at Ex. G.

¹⁴ *Id.* The release also lists the same campaign contact (King Penna).

¹⁵ *Id.* at Ex. H.

¹⁶ *Id.* at 4, and Exs. H, J, K, and L.

1 reasons why I am ... moving forward with my campaign for NJ 7th Congressional District.”¹⁷

2 The letter also asks, “return the enclosed envelope with your most generous investment into our

3 campaign for your future.”¹⁸ The letter uses the same campaign logo, lists a website,

4 www.WhoisDavidLarsen.com, and includes a disclaimer: “Paid for by David Larsen for

5 Congress,” along with an address and phone number. The reply insert states that it was “Paid for

6 by David Larsen for Congress *Exp.* Committee” [emphasis added] but asks that checks be made

7 payable and mailed to “David Larsen for Congress.”¹⁹

8 Larsen responds that he did not become a candidate until he “officially registered” with

9 the Commission in December 2015.²⁰ Larsen notes that he “did not deploy signs, open a

10 campaign office, seek signature petitions, advertise on radio, tv or newspapers,” and did not

11 actively campaign as a candidate until . . . Dec. [2015],” and primarily used his personal funds

12 during the exploratory period.²¹ Larsen further explains that the February 2015 statement was

13 his response to a reporter’s question asking if he would run again. Larsen contends that he meant

14 that he might run again, not that he had already decided to run.²² He argues that his fundraisers

15 were all under the “Exploratory label” and were aimed at determining the amount of support he

¹⁷ *Id.* at H.

¹⁸ *Id.*

¹⁹ *Id.* at Ex. J and K. Apparently, a nail file included with the mailing also contained the printed statement “David Larsen for Congress.” *Id.* at Ex. L.

²⁰ Resp. at 1. Larsen apparently believed, however, that he needed to register as a candidate with the FEC within 30 days of his decision to become a candidate. *Id.* at 4. Thus, he appears to acknowledge that the December 11 fundraising letter was sent after he made the decision to become a candidate. *Id.*

²¹ *Id.*

²² *Id.* at 3.

1 could receive.²³ Likewise, he discounts the October 2015 tweet, explaining that the press release
2 did not actually state that he was a candidate, but rather contained “a generic statement [] that
3 hopefully [Lance and McCarthy] will be unseated.”²⁴ Larsen also notes that the disclaimer
4 identifies his exploratory committee as opposed to his authorized campaign committee but
5 acknowledges that “the last sentence [of the October press release] could have been worded
6 differently.”²⁵

7 **B. Larsen Filed a Late Statement of Candidacy**

8 An individual is deemed to be a “candidate” for purposes of the Act if he or she receives
9 contributions or makes expenditures in excess of \$5,000.²⁶ Once an individual meets the \$5,000
10 threshold, he or she has fifteen days to designate a principal campaign committee by filing a
11 Statement of Candidacy.²⁷ The principal campaign committee must then file a Statement of
12 Organization within ten days of its designation, *see* 52 U.S.C. § 30103(a), and must file
13 disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b). Any
14 change or correction in the information on a Statement of Organization must be reported to the
15

²³ *Id.* He states that the sponsorship at the Reagan Day Dinner was also aimed at gauging interest and support for his campaign.

²⁴ *Id.* at 4.

²⁵ *Id.* at 3-4.

²⁶ 52 U.S.C. § 30101(2).

²⁷ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

1 Commission within ten days of the change or correction.²⁸ Treasurers of House candidates are
2 required to file quarterly reports in non-election and election years no later than the fifteenth day
3 following the close of the immediately preceding calendar quarter.²⁹

4 The Commission has established limited exemptions from these thresholds, which permit
5 an individual to test the feasibility of a campaign for federal office without becoming a candidate
6 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.

7 §§ 100.72 and 100.131 exclude from the definitions of "contribution" and "expenditure,"
8 respectively, those funds received, and payments made, to determine whether an individual
9 should become a candidate.³⁰ "Testing the waters" activities include, but are not limited to,
10 payments for polling, telephone calls, and travel.³¹ An individual who is "testing the waters"
11 need not register or file disclosure reports with the Commission unless and until the individual
12 subsequently decides to run for federal office or conducts activities that indicate he or she has
13 decided to become a candidate.³²

14 Certain activities may indicate that the individual has decided to become a candidate and
15 is no longer "testing the waters." Commission regulations set out five non-exhaustive factors to
16 be considered in determining whether an individual has decided to become a candidate. An

²⁸ 52 U.S.C. § 30103(c); 11 C.F.R. § 102.2(a)(2).

²⁹ 11 C.F.R. § 104.5(a).

³⁰ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . ."). *See* 52 U.S.C. § 30101(8), (9).

³¹ 11 C.F.R. §§ 100.72(a), 100.131(a).

³² *See id.*; *see also* Advisory Op. 1979-26 (Grassley).

1 individual indicates that he or she has gone beyond “testing the waters” and has decided to
2 become a candidate, for example, by making or authorizing written or oral statements that refer
3 to him or her as a candidate for a particular office.³³ These regulations seek to draw a distinction
4 between activities directed to an evaluation of the feasibility of one’s candidacy, and conduct
5 signifying that a private decision to become a candidate has been made.³⁴

6 Once an individual begins to campaign or decides to become a candidate, funds that were
7 raised or spent to “test the waters” apply to the \$5,000 threshold for qualifying as a candidate and
8 the candidate must register with the Commission.³⁵ Once an individual reaches candidate status,
9 all reportable amounts from the beginning of the testing-the-waters period must be disclosed on
10 the first financial disclosure report filed by the candidate’s committee, even if the funds were
11 received or expended prior to the current reporting period.³⁶

12 There is evidence indicating that Larsen had decided to run for Congress months before
13 his actual registration, and he became a “candidate” under the Act on July 20, 2015, when his
14 expenditures exceeded \$5,000. Most notably, the fundraising invitations the Committee sent in
15 June and August 2015 appear to publicize Larsen’s intention to run. Both invitations advertise
16 an event “hosted by Larsen for Congress.” They prominently display the “Larsen for Congress”
17 logo at the top of both invitations — the same logo the candidate used in a prior campaign. The

³³ *Id.* §§ 100.72(b), 100.131(b). The other examples set forth in these regulations indicating a person has decided to run for office include: (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) conducting activities in close proximity to the election or over a protracted period of time; or (4) taking action to qualify for the ballot under state law.

³⁴ See Advisory Op. 1981-32 (Askew) (“AO 1981-32”) (explaining that the testing the waters exemptions become inapplicable once the public activities of the individual take on a partisan political quality).

³⁵ 11 C.F.R. §§ 100.72(a), 100.131(a); see Factual and Legal Analysis (“F&LA”) at 3, MUR 6533 (Perry Haney); F&LA at 5, MUR 6449 (Jon Bruning).

³⁶ 11 C.F.R. §§ 101.3, 104.3(a), 104.3(b).

1 repeated references to “Larsen for Congress” and his congressional campaign, the use of “Larsen
2 for Congress” logo letterhead, the display of the “DavidLarsenForCongress” website address,
3 and the dissemination of these invitations via the “David Larsen for Congress” Facebook page
4 and @Larsen4Congress Twitter account adequately demonstrate that by June 2015, Larsen had
5 decided to run for Congress.³⁷

6 Larsen argues that the invitations did not show that he had decided to run because they
7 were sent under the name of his exploratory committee. The Commission, however, has
8 recognized that the mere use of the term “exploratory” in campaign communications is not the
9 determining factor in whether the candidate was still testing the waters.³⁸ Instead, the
10 Commission examines the rest of the communication along with the individual’s activities.³⁹
11 Moreover, Larsen’s references to his purported exploratory status were not clear; the invitations
12 requested “your presence at a Fundraising Event for his 2016 *Exp.* Congressional Campaign” and
13 the disclaimer at the bottom of the invitations states that it was “Paid for by David Larsen for

³⁷ AO 1981-32 at 4 (noting that activities that represent the establishment of a campaign organization fall outside the testing the waters exemption, and recommending that the individual avoid expressions such as “Askew for President” or similar statements in “titles or headings used to identify an office . . . and on letterhead stationery”); *see, e.g.*, Statement of Reasons, Comm’rs Peterson, Hunter, McGahn & Weintraub at 2, MUR 5930 (Schuring) (distinguishing case from MUR 2615 (Harriett Wieder) in which Wieder sent solicitations using printed letterhead that referred to her as a candidate). *Cf.* MUR 6776 (Innis for Congress) (dismissing matter where, among other factors, solicitations stated the individual sought financial support while he *explored* a possible run for Congress).

³⁸ *See* F&LA at 9, MUR 6449 (Bruning) (finding that even though it was sent under the exploratory committee letterhead, the text of a solicitation itself was an indication that candidate had decided to run); Second Gen. Counsel’s Rpt. at 4-6, MUR 5693 (Aronsohn) (rejecting argument that the communications at issue were covered under the testing the waters exemption merely because of their repeated use of the word “exploratory,” and finding probable cause based on other language and conduct indicating the decision to become a candidate had been made); F&LA at 7-8 MUR 5363 (Sharpton) (concluding individual became a candidate six months before he filed his Statement of Candidacy based on clear statements made in his book that he was running for President and finding that the formation of an “exploratory” committee did not negate those statements or “eradicate the registration and reporting requirements that [had] been triggered”).

³⁹ *See, e.g.*, Second Gen. Counsel’s Rpt. at 9-10, MUR 5693 (Aronsohn) (examining candidate’s statements along with indications that he was raising funds for the election and “not simply assessing the potential strength of his financial base”).

1 Congress *Exp.* Committee.” [Emphasis Added] The invitations do not explain that “Exp.” stood
2 for “exploratory,” nor the legal significance of that word.⁴⁰ Indeed, the Committee continued to
3 use the “Exp.” abbreviation in its December fundraising letter, which Larsen acknowledges was
4 sent after he had decided to become a candidate.

5 But there is also information that Larsen may have decided to run for office four months
6 earlier than the June 2015 invitation. A February 2015 press report quotes Larsen as saying “it’s
7 time to do it again,” and “we’ll win this time,” and Larsen linked to this report on his Twitter
8 feed without correction. Larsen now claims that these statements did not mean that he had
9 decided to run, merely that he was thinking about running, and he was also quoted in the article
10 as saying as “I think we’ll probably do it again,” which offers some support for his
11 position. However, taken as a whole, including the fact that he shared a link to this report from
12 his Twitter account, the more reasonable explanation of Larsen’s statements is that he had
13 already decided to run for Congress for a fourth time.

14 But even without the February 2015 statements, we conclude that the June 2015
15 invitation showed that Larsen had decided to run for Congress, and the Committee spent more
16 than \$5,000 by July 20, 2015. Thus, Larsen should have filed his Statement of Candidacy by
17 August 4, 2015, and the Committee should have filed a Statement of Organization within the
18 next ten days. However, Larsen filed his Statement of Candidacy 147 days late, in violation of

⁴⁰ Larsen sometimes used a more complete version of the Exploratory Committee’s full name on its communications during the first half of 2015. For example, on a Reagan Dinner sponsorship in March, it listed the Committee’s name as “David Larsen for Congress Exploratory Committee.” But he seemed to use both names (with and without the exploratory label) interchangeably in the Committee’s communications throughout the summer and fall. In the context of Advisory Opinions, the Commission has reiterated the need for political committees to fully identify themselves in their public communications in order to give the reader “adequate notice of the identity of the person or political committee that paid for the communication and where required, that authorized the communication.” See, e.g., Advisory Op. 2013-13 (Freshman Hold’em JFC) at 2-3; 11 C.F.R. § 110.11(c)(1). In this case, however, we do not have sufficient facts to determine if disclaimers were required for any of these communications.

1 52 U.S.C. § 30102(e), and the Committee filed a late Statement of Organization, in violation of
2 52 U.S.C. § 30103(a). In addition, the Committee's first disclosure report should have been the
3 2015 October Quarterly Report, covering the testing the waters period through September 30,
4 2015, and it violated 52 U.S.C. § 30104(a) by failing to file it. Therefore, there is reason to
5 believe that Larsen violated 52 U.S.C. § 30102(e) and that the Committee violated 52 U.S.C.
6 §§ 30103(a) and 30104(a).⁴¹

⁴¹ See, e.g., MUR 6449 (Bruning) (finding reason to believe that respondents did not timely file statements of candidacy and organization and authorizing pre-probable cause conciliation), MUR 5693 (Aronsohn) (same), MUR 5363 (Sharpton) (same). Cf. MUR 6785 (Kwasman for Congress) (dismissing as a matter of prosecutorial discretion because the statement of candidacy was filed only a few days late and did not cause the committee to miss filing a scheduled disclosure report); MUR 6533 (Perry Haney) (dismissing as a matter of prosecutorial discretion because regardless of the dates of statements that may have triggered candidacy, the committee still timely filed its initial disclosure report).